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U. S. SUPREME COURT, U. S.
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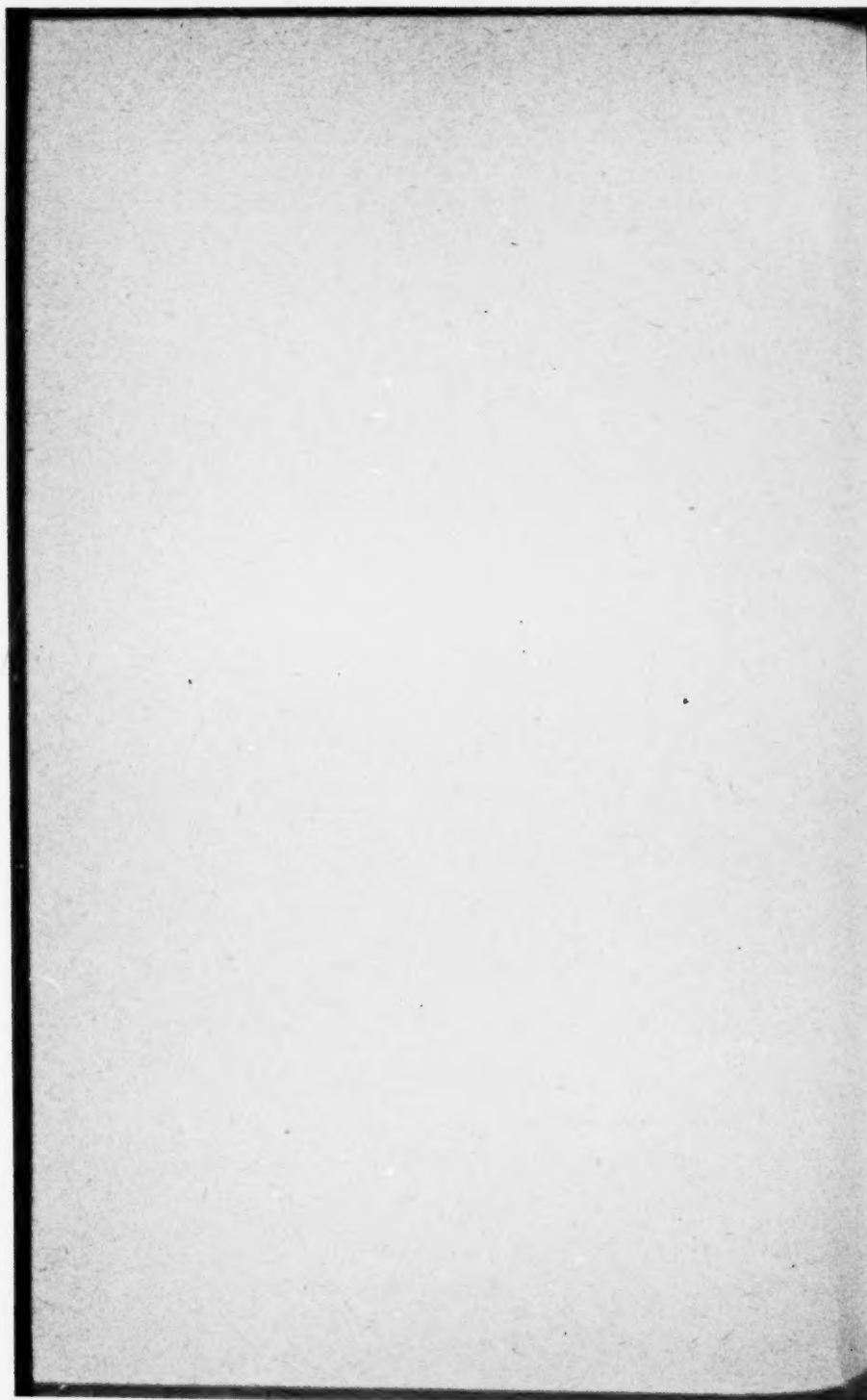
Supreme Court of the United States
OCTOBER TERM, 1942

WILGARD REALTY COMPANY, INC.,
Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**In the Supreme Court of the
United States**

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No.

WILGARD REALTY COMPANY, INC.,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

**TO THE HONORABLE THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:**

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered April 29, 1942 (R. 49).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28-38) is reported in 43 B.T.A. 557. The opinion of the Circuit Court of Appeals (R. 49-55) is reported in 127 F. 2d 514.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where taxpayer sustained a loss upon the voluntary sale of its real property in 1937, can Congress, by Section 213 (f) of the Revenue Act of 1939, constitutionally change the basis of the property, so as to convert taxpayer's prior loss into a gain and impose a tax thereon more than two years after the consummation of the sale?

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 8-11.

STATEMENT

The petitioner was organized and incorporated under the laws of New York State on August 12, 1932, with an authorized capital stock of 200 common shares of no par value. On August 16th following, W. H. H. Chamberlin, an individual, conveyed to petitioner certain business property located in Syracuse, N. Y., in consideration for petitioner's issuance to Chamberlin of its authorized capital stock, with the exception of three shares of the incorporators, and in further consideration of the agreement by petitioner to pay two mortgages on the property in the principal sum of \$35,000. Immediately upon the issuance of the stock to Chamberlin, he divested himself of control of the petitioner corporation by making gifts of about four-fifths of his newly acquired shares. (R. 26)

At the time of the conveyance of the real property to petitioner, the basis of the property in the hands of Chamberlin, the transferor, was its fair market value on March 1, 1913, which was, after adjustment for depreciation, \$65,041.67. (R. 27)

On February 18, 1937, the petitioner sold the property for \$19,000 cash, and the purchaser assumed and agreed to pay the two mortgages still remaining unpaid in the principal sum of \$35,000. From the date of petitioner's acquisition of the property to the date of its sale, depreciation was allowed and allowable in the amount of \$8,475. The expense of the sale was \$3,925.04. Petitioner was voluntarily dissolved on July 13, 1937. (R. 27)

The petitioner takes the position that the maximum \$2000 capital loss deduction was properly made in its 1937 Income and Excess Profits Tax Return, since the property acquired a new basis in 1932 when the petitioner assumed the transferor's mortgage obligations (\$65,041.67 plus \$35,000); that the subsequent sale of the property in 1937 resulted in a loss of \$41,-491.71 determined on such basis; and that Congress, by Section 213 (f) of the Revenue Act of 1939, cannot retroactively withdraw the basis acquired by the property in 1932, so as to convert into a gain the loss sustained upon the sale of the property in 1937, and thus create a new tax liability more than two years after the sale.

The respondent claims that such retroactive legislation is not repugnant to the due process clause of the Fifth Amendment and that therefore the 1937 sale of petitioner's property may be reopened two years later, a new basis substituted for determining gain or loss, a

gain of \$15,075.02 computed on the substituted basis, and a deficiency of \$2,716.23 assessed.

REASONS FOR GRANTING WRIT

The Circuit Court of Appeals has here decided an important question of federal and constitutional law which has not been, but should be, settled by this Court. The case presents for the first time the question of the constitutionality of Section 213 (f) of the Revenue Act of 1939, which, the petitioner maintains, effects a denial of due process. In support of its application herein the petitioner advances the following argument.

When the petitioner sold its real property on February 18, 1937, it voluntarily changed its position. In so doing, it sustained a capital loss under the law of the land then in effect, namely, Sec. 113 (a) (8), Revenue Act of 1936, and Sec. 112 (b) (5), Revenue Act of 1932. On March 28, 1938, this Court in *United States v. Hendler*, 303 U. S. 564, interpreted the said statutory provisions as allowing a loss such as claimed by the present petitioner. On June 29, 1939, the Revenue Act of 1939 became law; incorporated therein was Section 213 (f), the legislative intent of which was to nullify the effect of the provisions of prior revenue acts as construed in the *Hendler* decision.* The effect of Section 213 (f), as applied in the case at bar, is to convert into a gain the loss sustained by the petitioner on a sale made more than two years before the passage of the Act, and to tax the asserted gain.

The petitioner has no quarrel with the legislative custom of making an income-taxing statute retroactive

*76th Cong., 1st sess., House Rept. No. 855, pp. 5, 18-20; Cong. Rec., vol. 84—part 7, pp. 7481-2.

to the beginning of the taxable year in which it is enacted (*United States v. Hudson*, 299 U. S. 498, 500); nor does the petitioner here challenge the power of Congress merely to change the basis of property acquired in prior years for purposes of *prospective* taxation. But the petitioner does take its stand on the proposition that Congress cannot constitutionally reconstruct the pattern of prior revenue laws so as to levy a tax, where none existed before on a transaction consummated, as here, more than two and one-third years before the date of enactment. Although this retroactive period would appear grossly excessive, Section 213 (f) could by its terms operate to tax a transaction completed *more than four years* prior to the enactment of the Revenue Act of 1939.*

When the petitioner sold its real property in 1937, it voluntarily changed its position, much as does a donor who transfers his assets by gift. In the latter instance, this Court has held that the levying of a new tax upon a gift completed in the past would be so oppressive as to violate due process, since the donor could not have elected whether or not to make the gift in the light of the unforeseen tax. (*Nichols v. Coolidge*, 274 U. S. 531; *Blodgett v. Holden*, 275 U. S. 142; *Untermeyer v. Anderson*, 276 U. S. 440; *Coolidge v. Long*, 282 U. S. 582;

*Thus, where a sale at a loss had been consummated in May, 1935, a taxpayer on the basis of a fiscal year ending April 30th would report such loss in his return due July 15, 1936; the statute of limitations would not yet have run against the Commissioner when the Revenue Act of 1939 became law on June 29, 1939, and hence the Act by its terms permits the taxing of a transaction completed more than four years prior to its enactment!

Helvering v. Helmholz, 296 U. S. 93; *White v. Poor*, 296 U. S. 98.) By parity of reasoning in the present case, a new tax liability may not be retroactively imposed on a completed capital transaction such as a sale—a change of position no less voluntary than if resulting from a gift. Thus, the Court of Appeals for the District of Columbia has indicated that the rule established in the gift cases would invalidate a tax on transactions for profit consummated in a prior year (*Neild v. District of Columbia*, 110 F. 2d 246, 253).

The Court below ultimately rests its decision (R. 55) upon the supposition that both parties to the 1932 exchange then believed erroneously that such transaction was tax-free, and that therefore the present petitioner is not legally harmed by the challenged statute which merely conformed the law with their alleged belief. However, there is a total absence of evidentiary support in the stipulated facts (R. 25-27) for such an inference; and, even assuming *arguendo* the correctness of the inference, the Court's legal conclusion does not follow. Whatever interpretation was put upon the exchange transaction by Chamberlin, the individual transferor, his views of the law in no wise bound his transferee, the present petitioner. Chamberlin, it will be recalled, divested himself of control of the petitioner corporation immediately following the exchange (R. 26), and was thereafter a mere minority stockholder. In every tax return filed by the petitioner throughout its existence, it evaluated its real property on the theory of a new stepped-up basis acquired in 1932, and otherwise conducted itself in a manner entirely consistent with its present position. It is difficult to see what more the petitioner was re-

quired to do in order to apprise the Commissioner that it at all times treated the basis of the real property as increased after the exchange. To deny the petitioner relief on the theory that it is forever bound by an alleged mistake of law on the part of its transferor is a manifest injustice. And to permit the imposition of a tax on capital transactions completed in prior years violates the spirit of fair play which under the Constitution should mark the relations between taxpayers and their Government.

WHEREFORE, in order to have the important question of federal and constitutional law appearing herein settled by this Court, the petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day certain, a complete transcript of the record and proceedings of said Circuit Court of Appeals in this case entitled "*Wilgard Realty Company, Inc. v. Commissioner of Internal Revenue*, October, 1941, Term, No. 44," to the end that said case may be reviewed and determined by this Court as provided by law, and that the petitioner may have such other and further relief as to this Court may seem appropriate, and that the judgment of the Circuit Court of Appeals may be reversed by this Honorable Court.

Respectfully submitted,

WILGARD REALTY COMPANY, INC.

By HENRY S. FRASER,
DAVID A. FRASER,
Attorneys for Petitioner.

JULY 24, 1942.